Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the	)	
Telephone Consumer Protection Act in Light	)	
of D.C. Circuit's ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

RESPONSE OF THE A TO Z COMMUNICATIONS COALITION AND THE INSIGHTS ASSOCIATION TO THE BUREAU'S REQUEST FOR FURTHER COMMENT

The A to Z Communications Coalition[1] and the Insights Association[2]

(collectively, the "Joint TCPA Commenters"), by their attorneys, hereby respectfully submit

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[1] The A to Z Communications Coalition is an informal coalition of entities concerned about over-reach in the Telephone Consumer Protection Act ("TCPA"). The Coalition is working to enact legislative and administrative rules that balance consumer protection against abusive telemarketing practices with legitimate attempts by businesses and others to provide useful and relevant information to consumers in a cost-effective manner.

[2] Representing more than 4,000 members across the United States, the Insights Association is the leading nonprofit trade association for the market research and data analytics industry, and the leader in establishing industry best practices and enforcing professional standards. The Insights Association's membership includes both research and analytics companies and organizations, as well as the researchers and analytics professionals and research and analytics departments inside of non-research companies and organizations. Marketing researchers are an essential link between businesses and consumers, and between political leaders and constituents; they provide important insights about consumer and constituent preferences through surveys, analytics, and other qualitative and quantitative research. On behalf of their clients—including the government, media, political campaigns, and commercial and non-profit entities—researchers design studies and collect and analyze data from small but statistically-balanced samples of the public. Researchers seek to determine the public's opinion and behavior regarding products, services, issues, candidates, and other topics in order to help develop new products, improve services, and inform public policy. The TCPA makes it exceptionally challenging, and legally hazardous, for telephone survey researchers to connect with the

these comments in response to the Consumer and Governmental Affairs Bureau's request for supplemental comment in light of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC.*[3] For the reasons explained below, the *Marks* decision does not limit the Commission's obligation to interpret the TCPA as it relates to the definition of an automatic telephone dialing system ("ATDS"). *Marks* begins with the premise that the statutory definition is "ambiguous on its face," a conclusion that vests in the Commission the same discretion to interpret the statute as it would have if *Marks* had not been decided at all.[4] Accordingly, the Joint TCPA Commenters submit that the Commission should proceed to interpret an ATDS in this remand proceeding consistent with the guidance provided by the D.C. Circuit in *ACA International.*

I. Background

ACA International marked a much-needed reset for the Commission's interpretation of the TCPA. "Impermissibly expansive" FCC interpretations had fueled out-of-control class action cases that distorted the consumer protection purposes of the TCPA. Rather than protecting consumers from abusive practices while balancing legitimate business communications, the TCPA landscape had become a minefield that penalizes callers and discourages communications that benefit consumers. With the remand from the D.C. Circuit

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67.6 percent of American households who are essentially only reachable on their wireless phones.

3 *See Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision*, CG Docket No. 18-152 et al., Public Notice, DA 18-1014 (rel. Oct. 3, 2018) ("Supplemental Request"). *See also ACA Int'l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

4 *See National Cable and Telecommunications Ass'n v. Brand X*, 125 S. Ct. 2688 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

Court of Appeals and the Pai Commission's own actions aimed at abusive telemarketing practices, the Commission has an opportunity to restore balance and reason to the TCPA.

In comments submitted on June 7, 2018 in these dockets, the Joint TCPA Commenters urged the Commission to replace the 2015 TCPA Order's[5] flawed interpretation of an ATDS with one that adheres to the language and intended purpose of the TCPA.[6] Moreover, the Joint Commenters urged the Commission to give concrete guidance as to the specific capacities that an ATDS must possess, in order to provide predictability for legitimate outbound calling practices. Businesses contacting Americans should be able to know whether their equipment is an ATDS or not, before a call is made. A clear definition, grounded in the statutory language, would stem the land-rush of TCPA class actions that threaten to prevent appointment reminders, school notifications, marketing research surveys, political polls and other communications which the consumer wants (or needs) to receive.

An ATDS is defined in the TCPA as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[7] As explained in the June 7 comments, the Commission should define ATDS based on the plain language of the TCPA. Congress's chosen language is focused on the abusive contact practices that harmed consumers – namely, the use of equipment to generate and store random or sequential telephone numbers and then dial those numbers. Such

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5 *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, 30 FCC Rcd. 7961 (rel. July 10, 2015) ("2015 TCPA Order").

6 Comments of the A to Z Communications Coalition and the Insights Association, CG Dkt Nos. 18-152, 02-278 and 17-59, filed June 7, 2018 ("Joint TCPA Comments").

7 47 U.S.C. § 227(a)(1).

"carpet-bombing" calling harms consumers and was prohibited by the TCPA. By contrast, targeted calling to consenting consumers, statistically valid samples and other outbound calling methods are legitimate business practices that the TCPA permits. Accordingly, the Joint TCPA Commenters recommended that the Commission adopt an interpretation that encompasses the equipment Congress found harmful while allowing legitimate outbound calling practices.[8]

II. The *Marks* Case Does Not Limit the FCC's Discretion, or its Obligation to Respond to *ACA International*

In the *Supplemental Notice*, the Bureau asks how to interpret the statutory definition of an ATDS in light of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, and how the Ninth Circuit's decision might bear on the analysis of the D.C. Circuit in *ACA International v. FCC*.[9] Joint Commenters submit that *Marks* should not restrict the Commission's interpretation, and it does not relieve the Commission of the obligation to respond to the remand issued by the D.C. Circuit in *ACA International*. Moreover, precedent clearly establishes that the *Marks* decision is not binding on the FCC and that the court's interpretation of what it deemed an ambiguous statutory provision does not deprive the FCC of the discretion afforded by *Chevron*.[10] Therefore, the FCC is free to move forward with an interpretation of the

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8 Joint TCPA Comments, at 5-6. Joint TCPA Commenters also noted that an interpretation faithful to the statutory language does not open the floodgates to unwanted calls. The Commission and the industry are pursuing a number of measures that will reduce illegal calls and also empower consumers to reduce lawful, but unwanted calls at their discretion. *See* Joint TCPA Comments at 8-9 (discussing SHAKEN/STIR, call blocking and alternative statutes which empower federal or state authorities to combat deceptive or fraudulent practices).

9 *Supplemental Notice* at 2.

10 *See National Cable and Telecommunications Ass'n v. Brand X*, 125 S. Ct. 2688 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

statute that differs from the Ninth Circuit's reading, so long as the interpretation is otherwise reasonable under *Chevron*.

First, the Ninth Circuit's interpretation of the statutory language conflicts with the findings of both the D.C. Circuit and the Third Circuit. In *Marks*, the Ninth Circuit took an expansive view of an ATDS under the statute.[11] The Court held that the language of Section 227(a)(1) is ambiguous on its face and therefore considered "the context and structure of the statutory scheme."[12] Analyzing these factors, the Ninth Circuit concluded that, "although Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers – a common technology at that time – language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA."[13] This conclusion conflicts with the conclusion reached by the Third Circuit, in a decision likewise issued after *ACA International*, which held that equipment must have the capacity to "generat[e] random or sequential telephone numbers and dial[] those numbers."[14]

Moreover, the Ninth Circuit's decision conflicts with the D.C. Circuit's analysis in *ACA International*. *Marks* at least opens the possibility that ordinary smartphones could fall within the definition of an ATDS, provided such equipment can dial from a stored list of numbers. In *ACA International*, the court clearly held that the attempt by the Commission to adopt such a broad definition of ATDS – one which would have "[brought] within the

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11 *Marks v. Crunch Sand Diego, LLC*, No. 14-56834 (9th Cir. Sept. 20, 2018).

12 *Id.* at slip op. 20-21.

13 *Id.* at slip op. 21.

14 *Dominguez v. Yahoo, Inc.*, 2018 WL 3118056, at *3-4.

definition's fold the most ubiquitous type of phone equipment known,"[15] – *i.e.,* smartphones – "would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers."[16] That reading of the TCPA, the D.C. Circuit explained, "is an unreasonably, and impermissibly, expansive one."[17] The Ninth Circuit does not discuss the reach of its decision, nor does it address its apparent acquiescence to a scope of coverage that the D.C. Circuit found impermissibly expansive. Because the decision reaches a conclusion that appears to be at odds with a clear holding of *ACA International* – namely, that it is impermissible to read the TCPA's ATDS provision to encompass ordinary smartphones – *Marks* is itself suspect. Were the FCC to follow *Marks*, it would run afoul of the D.C. Circuit's treatment of the case.

The *Supplemental Notice* asks, to the extent that the statute is ambiguous, how the Commission should exercise its discretion to interpret such ambiguities on remand.[18] Initially, we submit that the better reading is that the ATDS definition is *not* ambiguous; rather, the plain language of Section 227(a)(1) makes clear that the equipment must store or produce telephone numbers, "using a random or sequential number generator."[19]

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15 *ACA International*, 885 F.3d at 698.

16 *Id.* at 698. In reaching this conclusion, the D.C. Circuit looked to the legislative history of the TCPA, and found that the statute was enacted in an effort to address issues related to approximately "30,000 businesses [that] actively telemarket goods and services to business and residential customers." *Id.*

17 *Id.*

18 *Supplemental Notice* at 2.

19 Joint TCPA Comments, at 4-5.

Moreover, nothing in the *Marks* decision limits the FCC's discretion to interpret Section 227(a)(1). The FCC has faced a situation where a court has adopted an interpretation of a statutory provision prior to the Commission giving its considered interpretation of that same provision. In such a situation, the U.S. Supreme Court has definitively answered the question posed in the *Supplemental Notice*. The short answer is that the Ninth Circuit's decision does not restrict the FCC's discretion to interpret Section 227(a)(1) and provide guidance on the scope of equipment that may qualify as an ATDS.

The FCC and the courts faced a similar situation in the *Brand-X* case involving the classification of cable modem services. While the FCC was contemplating the proper classification of cable modem services, the Court of Appeals for the Ninth Circuit heard an appeal involving AT&T Corp. and the City of Portland, Oregon. The Ninth Circuit determined that cable modem service was a telecommunications service, but, subsequently, the FCC issued a Declaratory Ruling classifying cable modem service as an information service. Upon review of the FCC Declaratory Ruling, the U.S. Supreme Court in *Brand-X* concluded that the Ninth Circuit's conflicting construction of the statute did not restrict the FCC's discretion under *Chevron*. The Court explained:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. ... Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.[20]

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20 *National Cable and Telecommunications Ass'n v. Brand X*, 125 S. Ct. 2688 (2005).

Here, the *Marks* decision expressly finds that the statutory definition of an ATDS is "ambiguous on its face."[21] Following *Brand-X*, therefore, the Commission's construction is not foreclosed, provided the interpretation is otherwise consistent with *Chevron*. That is, the Commission is free to reach a conclusion contrary to the Ninth Circuit (and, to be clear, Joint TCPA Commenters submit that it should). Therefore, while the FCC is free to consider the analysis in *Marks*, it is not bound by that interpretation. It can and should reach its own conclusion as to the meaning of Section 227(a)(1).

III. EQUIPMENT MUST BE ABLE TO STORE OR GENERATOR NUMBERS, USING A RANDOM OR SEQUENTIAL NUMBER GENERATOR, AND TO DIAL SUCH NUMBERS, IN ORDER TO BE WITHIN THE SCOPE OF THE STATUTE

The Joint TCPA Commenters support the U.S. Chamber's position in this docket that "in order to be an ATDS subject to Section 227(b)'s restrictions, dialing equipment must possess the functions referred to in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers."[22] This interpretation is consistent with the plain language of the statute, which is "the clearest indication of Congressional intent."[23] As then-Commissioner Pai noted in 2015, "[t]he statute lays out two things that an [ATDS] must be able to do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment cannot do those two things – if it cannot store or produce

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21 *Marks*, slip op. at 20.

22 U.S. Chamber Petition at 21.

23 *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (internal citations omitted).

telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers – then how can it possibly meet the statutory definition?"[24]

This interpretation also recognizes that technology has changed in the 27 years since the TCPA was adopted, and that modern dialing equipment does not create the same harms that Congress sought to address. It should not be surprising to find that the telecommunications industry has moved beyond the crude dialing equipment that caused the harms Congress addressed in the TCPA. The court in *Marks* implicitly recognizes this point, yet effectively rewrites the statute to cover equipment that is more common today.[25] However, the court in *ACA International* astutely observed that

> "Congress need not be presumed to have intended the term [ATDS] to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a 'paging service' or 'specialized mobile radio service,' … yet those terms have largely ceased to have practical significance."[26]

Accordingly, rather than adopting an interpretation of ATDS that expands the definition of an ATDS to equipment that does not possess random or sequential number generators, the Commission should adopt an interpretation of the statute that is faithful to Congress' intent in 1991. As Joint TCPA Commenters noted in their initial comments, the Commission can effectively address harms from other types of dialing practices (or equipment) by using the many tools at its disposal. More effective enforcement, prompt implementation of

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24 2015 TCPA Order, Dissenting Statement of Commissioner Ajit Pai.

25 *Marks v. Crunch San Diego, LLC*, slip op. at 21 (referring to equipment with sequential or random number generators as "a common technology *at that time*") (emphasis added).

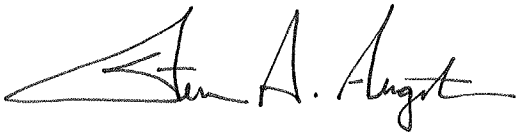
26 *ACA International,* 885 F.3d at 699.

call authentication technologies like SHAKEN/STIR, better databases to identify reassigned numbers, the availability of third-party call control applications for consumers and careful consideration of the extent to which carriers may block potentially illegal calls will, collectively, help reduce both illegal calls and lawful but unwanted calls to consumers. The Commission is better off focusing its efforts on meaningful call abatement measures such as these, rather than on expanding the scope of an ATDS in an misguided attempt to declare legitimate business practices (and necessary or desired communications) to be unlawful.

CONCLUSION

The Joint TCPA Commenters respectfully request that the Commission take these comments into consideration and expeditiously issue an order clarifying the issues discussed herein.

Respectfully submitted,



Steven A. Augustino
KELLEY DRYE & WARREN LLP
3050 K Street NW
Suite 400
Washington, D.C. 20007
(202) 342-8400 (Voice)
saugustino@kelleydrye.com

Counsel for Joint TCPA Commenters

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